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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 WILLIAM McKNIGHT, et al.,

Case No. 2:16-cv-02643-APG-PAL

8 Plaintiffs,

ORDER

9 v.

(Motions – ECF Nos. 128; 131; 159; 163;  
164)

10 NOBU HOSPITALITY GROUP LLC, et al.,

11 Defendants.

12 Before the court are the following motions and related documents which the court has  
13 reviewed and considered:

- 14 1. Defendant Desert Palace's Motion to Amend the Scheduling Order (ECF No. 128);  
15 Response (ECF No. 141); and Errata (ECF No. 145).

16 The motion seeks leave to amend the scheduling order to substitute one rebuttal expert for  
17 another after the scheduling order deadline because the first rebuttal expert was unable to provide  
18 a list of his prior testimony and trial list for the past four years. The proposed substitute expert has  
19 adopted the same opinions but is able to provide the information required by Rule 26(a)(2)(B).  
20 Plaintiffs oppose the motion as untimely and because the defendants have repeatedly been  
21 uncooperative with respect to providing the job file and other information plaintiff.

22 The court finds defendants' failure to timely disclose the information required by Rule  
23 26(a)(2)(B) is not substantially justified. The court will grant the motion and allow the substitution  
24 of experts, but sanction defendants by requiring defendants to pay the expert's deposition  
25 preparation and attendance fees and plaintiffs' attorneys' fees and costs for taking the deposition.

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1           2. Defendant Desert Palace's Motion to Substitute Defense Expert, Michael Brant-  
2           Zawadzki, M.D. (ECF No. 131); Response (ECF No. 141); Errata (ECF No. 145) and  
3           Reply (ECF No. 146).

4           This was initially filed as one motion with ECF No. 128. Defendants seek leave to  
5           substitute one neuroradiologist rebuttal expert Dr. King, for neuroradiologist Brant-Zawdowski for  
6           the reasons stated above. The court will grant the motion but limit Dr. King's testimony and  
7           opinions to those already disclosed by Dr. Brant-Zawdowski, and sanction defendants for the late  
8           disclosure as set forth in the prior paragraph.

9           3. Motion for Emergency Protective Order (ECF No. 159); Response (ECF No. 166); and  
10          Reply (ECF No. 169).

11          Defendants sought an emergency protective order precluding plaintiffs' counsel from  
12          asking their Rule 30(b)(6) designees questions at their depositions on topics the court had  
13          previously excluded at a hearing held on November 28, 2018. Additionally, the motion asked for  
14          emergency relief because one of its designees was unavailable on the date scheduled for her  
15          deposition. Plaintiffs oppose the motion. Defendants' motion is denied. Defendants have  
16          repeatedly failed to produce witnesses scheduled for deposition and requested that depositions be  
17          scheduled at the 11th hour. To the extent defendants believe questions were asked at a Rule  
18          30(b)(6) deposition on topics the court did not allow, Rule 30(c) and (d) remedies apply.

19          4. Plaintiffs' Motion to Preclude Defendants from Offering or Relying Upon any Expert  
20          Testimony and/or Witnesses Not Disclosed Pursuant to Fed. R. Civ. P. 26(a)  
21          (ECF No. 163); Response (ECF No. 168); and Reply (ECF No. 171).

22          Discovery in this case closed October 31, 2018 after multiple extensions. However, the  
23          court allowed plaintiffs to complete depositions of multiple individuals identified in discovery  
24          responses and status reports. The deadline for disclosing initial experts closed August 14, 2017.  
25          Defendants served discovery responses December 11, 2018 and January 4, 2019. Plaintiffs seek  
26          to preclude defendants from offering opinion testimony of Dr. Donald Reisch, an emergency room  
27          physician, and/or Ronald Tucker, an EMT, that Mr. McKnight's claimed injuries were caused by  
28          a syncopal episode and/or fainting. Defendants oppose the motion arguing both witnesses were

1   deposed by defendants long before the close of discovery in September 2017 and plaintiffs'  
2   counsel had the opportunity to cross-examine the witnesses about their percipient observations and  
3   opinions. Neither is a retained expert. The discovery disclosures served in December 2018 and  
4   January 2019 were the result of orders compelling the defendants to supplement many discovery  
5   responses the court found deficient. Plaintiffs' motion is therefore denied.

6           5. Plaintiffs' Motion for Sanctions Pursuant to Fed. R. Civ. P. 37(c)(1) (ECF No. 164);  
7           Response (ECF No. 167); and Reply (ECF No. 170).

8           Plaintiffs seek to preclude defendants from calling witnesses and introducing documents  
9   not disclosed before the close of discovery in a supplemental Rule 26(f) disclosure served January  
10   9, 2019. The disclosure identified 20 witnesses not previously disclosed whom defendants may  
11   call at trial, and 26 additional "placeholder" witnesses with descriptions such as "treating nurses",  
12   "treating physicians", and custodians of records for various hospitals and other health care  
13   providers. In addition, defendants served approximately 200 additional documents. Defendants  
14   oppose the motion pointing out that plaintiffs requested and received leave to depose many of the  
15   individuals now disclosed as witnesses. Additionally, the supplemental disclosures were made to  
16   comply with the court's orders.

17           The motion is granted with respect to the unidentified "placeholder" witnesses, and  
18   witnesses plaintiffs have not deposed, except for those witnesses not yet deposed that the court has  
19   granted plaintiff the opportunity to depose. The motion is also granted with respect to documents  
20   supporting defendants' defenses disclosed after the close of discovery. With respect to these  
21   witnesses and documents, defendants have not shown the late disclosures were substantially  
22   justified or harmless. Therefore, preclusion sanctions under Rule 37(c) are appropriate. The  
23   witnesses and documents may not be used except for impeachment.

24           Having reviewed and considered the matters,


25           **IT IS ORDERED** that:

26           1. Defendant Desert Palace's Motion to Amend the Scheduling Order (ECF No. 128) is  
27           **GRANTED.**

- 1 2. Defendant Desert Palace's Motion to Substitute Defense Expert, Michael Brant-
- 2 Zawadzki, M.D. (ECF No. 131) is **GRANTED subject to the sanctions and**
- 3 **limitations imposed in this order.** The parties shall meet and confer to set Dr. King's
- 4 deposition as expeditiously as possible on a date mutually agreeable to the witness and
- 5 counsel within the next 45 days.
- 6 3. Motion for Emergency Protective Order (ECF No. 159) is **DENIED.**
- 7 4. Plaintiffs' Motion to Preclude Defendants from Offering or Relying Upon any Expert
- 8 Testimony and/or Witnesses Not Disclosed Pursuant to Fed. R. Civ. P. 26(a)
- 9 (ECF No. 163) is **DENIED.**
- 10 5. Plaintiffs' Motion for Sanctions Pursuant to Fed. R. Civ. P. 37(c)(1) (ECF No. 164) is
- 11 **GRANTED in part and DENIED in part** consistent with this order.
- 12 6. Plaintiffs shall have until **June 28, 2019** to file a motion for attorneys' fees and costs
- 13 in strict compliance with LR 54-14 outlining the costs and attorneys' fees sought as
- 14 monetary sanctions for the series of discovery disputes in which the court has granted
- 15 plaintiffs' relief.
- 16 7. Defendants shall have until **July 12, 2019** to file a response to the motion for attorneys'
- 17 fees and costs.
- 18 8. Plaintiffs shall have until **July 19, 2019** to file a reply which may not exceed 5 pages.

19 DATED this 30th day of April 2019.

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22 PEGGY A. LEEN

23 UNITED STATES MAGISTRATE JUDGE

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